U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 07 May 2004

CASE NO.: 2003-LHC-1668

OWCP NO.: 7-156932

IN THE MATTER OF

RONALD AMBO
Claimant

v.

FREIDE GOLDMAN HALTER, INC.
Employer

AND

LOUISIANA INSURANCE GUARANTY ASSOCIATION
Carrier

APPEARANCES:

Tommy Dulin, Esq
For Claimant

Jerald Album, Esq.
Robert Reich, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Ronald Ambo (Claimant) against Freide Goldman Halter Inc. (Employer) and Louisiana Insurance Guaranty Association (Carrier). The formal hearing was conducted in Gulfport, Mississippi on January 14, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-22 and Employer's Exhibits 1-6, 10, 13-17, 19-22.[2] This decision is based on the entire record.[3]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on May 18, 2000;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on May 18, 2000;
5. A Notice of Controversion was filed May 22, 2000;
6. An informal conference was held on March 31, 2003;
7. The average weekly wage at the time of injury is disputed;
8. Temporary total disability and temporary partial disability is disputed;
9. Employer paid Claimant benefits including temporary total disability;
10. Medical benefits have been paid;
11. Permanent disability and impairment rating is disputed; and
12. Date of maximum medical improvement is disputed.

Issues

[1]The parties were granted time post hearing to file briefs. This time was extended up to and through March 31, 2004.

[2] Employer's Exhibits 7,8,9, were excluded (TR 12), as well as Employer's Exhibits 11, 12, and 18 (TR 15). Employer's Exhbits 19-22 were submitted post hearing. Claimant's Exhibit 22, Dr. Dolly's records from the last 30 days wer to be submitted (TR 202).

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

The unresolved issues in this proceeding are:

1. Average Weekly Wage;
2. Nature & Extent of Disability;
3. §7 Medicals; and
4. Attorney's Fees, Penalties and Interest.

Statement of the Evidence
Testimonial and Non-Medical Evidence

Ronald Ambo

Claimant, age 46 at the time of the formal hearing, completed the 11th grade in high school and testified that he had no problem reading or writing, however, he did not attained his GED (TR 37). He was employed as a diesel mechanic, a physically demanding job, for Employer, and acquired his skills while on the job. Claimant was a 5 day worker, who typically worked considerable overtime, often working 7 days a week 10-12 hours a day.

On May 18, 2000, Claimant was on the boom of a crane helping to disassemble the rigging. The ball of the crane swung around and grazed Claimant's head and neck, knocking his hard hat off his head (TR 60). The hit was significant enough to knock Claimant forward onto the boom of the crane. Directly following the accident, Claimant was taken to Dr. Frank Schiavi, an orthopedic surgeon, who treated Claimant and released him back to work with restrictions on May 22, 2000. Claimant explained that he currently suffers from dizziness, headaches, a painful neck and back, right leg numbness, memory problems and a limited range of motion for his neck (TR 82-83). None of Claimant's physicians have given an explanation for the pain and numbness in Claimant's arms or legs (TR 114-115).

Claimant has not attempted to return to work since the accident (TR 82). However, he testified at the formal hearing that he would be willing to work all hours and had skills to perform calculations and complete paperwork, as well as learning skills and information on the job (TR 94-95). Claimant also agreed that he had the ability to learn small engine and motor repair, providing he was permitted to sit *and* stand (TR104). He added that he would return to work if Dr. Bartholomew said he was able (TR 116)

Claimant explained that he had previous work place accidents including

falling from a truck and hitting his tailbone and right shoulder in 1989, and then in 1992 he was blind sided by another car, and underwent carpal tunnel release as a result (TR 101). Claimant stated that neither of his prior injuries prevented him from fully performing his job as a diesel mechanic for Employer.

Jeannie Lillis

Jeannie Lillis, of Younger & Assoc., testified at the formal hearing as a vocational rehabilitation expert (TR 149-151). Initially, Claimant's interview was performed by Ms. Lillis' associate, Ms. Sandra Lorenz, on December 29, 2003. Using the medical restrictions identified by Dr. Bradley Bartholomew and Dr. Victor Bazzone on September 23, 2002. Ms. Lillis identified sedentary jobs for Claimant that would not require Claimant to bend, stoop, or lift more than 10 lbs (TR 161). The three jobs Ms. Lillis identified on January 7, 2004, as suitable for Claimant are as follows: 1) a checker at Piccadilly restaurant in Slidell, Louisiana, earning $6/hr; 2) a call center representative with NFP in Slidell, Louisiana, earning $7/hr; and 3) a customer service specialist in visitor services with the Nature Center in New Orleans East earning $7/hr. Ms. Lillis agreed that although Claimant did not have high scores on the intellectual testing portion of his evaluation he was still within the range to perform the jobs listed. Ms. Lillis felt that Claimant was employable (TR 158-162). Ms. Lillis explained that she had placed individuals in job types like the three chosen who had the same physical restrictions and intellectual capability as Claimant (TR 179).

Medical Evidence

Claimant was treated by Dr. Frank Schiavi, an orthopedic surgeon, immediately following the accident. Shortly thereafter, Claimant chose Dr. Dropadi Kewalramani to be his treating physician. Dr. Robert Applebaum evaluated Claimant on behalf of Employer. Dr. Victor Bazzone was chosen by the parties to perform an independent medical examination. Dr. Bradley Bartholomew was recommended by Dr. Kewalramani to evaluate Claimant. And finally, Dr. Kevin Greve evaluated Claimant on the recommendation of Dr. Bartholomew, to determine Claimant's psychological condition.

Dr. Frank Schiavi

Dr. Frank Schiavi, a board certified orthopedic surgeon, first saw Claimant on the day on his accident, May 18, 2000. Dr. Schiavi's post-hearing deposition is

Employer's Exhibit 19 and his documents are Employer's Exhibit 1.[4] Dr. Schiavi examined Claimant and, finding no signs of a concussion, diagnosed Claimant with a soft tissue muscle pain in the neck with no evidence of a fracture. Dr. Schiavi removed Claimant from work and prescribed physical therapy, heat applied to the neck, and a prescription for Skelaxin.

On May 22, 2000, Dr. Schiavi returned Claimant to work subject to restrictions[5], after having found Claimant had a full range of motion in the cervical spine and no muscle spasms (CX 8, p. 6). Dr. Schiavi stated that there were no neurological findings for major trauma to the head which were objectively noticeable (EX 19, p. 27).

Dr. Dropadi Kewalramani

Dr. Dropadi Kewalramani ("Dr. Dolly K"[6]) was Claimant's choice of physicians as of June 1, 2000 (CX 5, p. 1). Dr. Kewalramani is a board certified specialist in physical medicine and pain management (CX 9, p. 86-87). Dr. Kewalramani began treating Claimant on June 2, 2000, and continued to treat Claimant conservatively over the course of two years. Her records are part of Claimant's Exhibit 9.

Dr. Kewalramani saw Claimant beginning on June 2, 2000 for this particular injury, however, she had previously treated Claimant for other injuries beginning in 1989 (TR 125-133). From June 2000 through December 2003, the three years in which Dr. Kewalramani treated Claimant, there were minor changes; either exacerbations of pain or slight improvements. However, there were no substantial changes during that time. The treatment Dr. Kewalramani offered was conservative; prescribing medication, pain treatments, and a variety of therapies. On September 7, 2001, Dr. Kewalramani noted that Claimant had taken a turn for the worse and she advised him to have surgery on the neck since there was nothing else she could offer him.[7] As of February 6, 2002, Dr. Kewalramani was still waiting for surgery to be approved and continued to monitor Claimant's condition, consistently noting no "appreciable change" or improvement in his symptoms or objective findings (CX 9, p. 61).

---

[4] Dr. Schiavi's records are handwritten and not transcribed. Consequently they are very difficult to read.
[5] Claimant was restricted from climbing, bending, stooping, and lifting exceeding 5 lbs (EX 1, p. 6).
[6] Due to the difficulty pronouncing this doctor's name she was referred to throughout these proceeding by various individuals as "Dr. Dolly".
[7] In the appointment 10 days earlier, Dr. Kewalramani had noted that there was no tenderness of the cervical spine and only mild spasms pf the paraspinal trapezii.

On various visits, Dr. Kewalramani noted, by way of physical examination, that Claimant suffered from paravertebral tenderness and spasms. While Dr. Kewalramani felt that Claimant continued to be symptomatic, often it was Claimant's subjective complaints of increased or decreased pain that determined the doctor's general notations of improvement or exacerbation (CX 9).

On Decemebr 1, 2003, Dr. Kewalramani assigned permanent restrictions instructing Claimant to limit pushing, pulling, lifting more than 20 lbs, and reaching above his shoulders (CX 9, p. 83). Claimant testified that Dr. Kewalramani never referred him to a neurologist in spite of his complaints of dizziness (TR 137-138).

Dr. Robert Applebaum

Dr. Robert Applebaum, a board certified neurosurgeon, who examined Claimant on August 8, 2000 and June 27, 2001, was the physician selected by Employer (TR 148). Dr. Applebaum's records are part of Employer's Exhibit 17, and his post-hearing deposition is Employer's Exhibit 22. On the initial visit, August 8, 2000, Dr. Applebaum noted that during the physical examination, Claimant would voluntarily move his neck further than he would allow the doctor to move it during the exam (EX 22, p. 11). Additionally, Dr. Applebaum noted that some of the results of testing were inconsistent, specifically, in regards to the straight leg raising test and the bow string test. Both tests should have yielded similar results, in that they test the same grouping of nerves; however, in Claimant's case one was positive bilaterally and the other negative (EX 22, p. 11). Dr. Applebaum, upon completing his examination and review of the prior medical records, concluded that Claimant showed minimal mechanical and neurological findings, and therefore, felt it was unlikely that Claimant had disease or damage involving the spinal cord of nerve roots. He recommended an MRI of the entire spine to rule out the possibility of a significant intraspinal lesion (EX 17, p. 3).

On June 27, 2001, Dr. Applebaum re-examined Claimant, noting that Claimant complained of headaches, pain in the neck, dizziness, numbness in the left arm and leg, and pain in his back and trouble with his memory (EX 17, p. 4). He opined that assuming the MRI did not show a surgical lesion in the neck or lumbar region, that Claimant was at maximum medical improvement. Consequently, he felt that Claimant could return to work, in spite of the neck and back pain of undetermined etiology, and would be restricted from prolonged bending and stooping or lifting anything over 40 lbs. Dr. Applebaum expressed

interest in reviewing the pending MRI, and assigned a 5% permanent impairment rating as a result of the continuing pain and degenerative changes present in Claimant's lumbar and cervical spine (EX 17, p. 6)

On November 5, 2001, Dr. Applebaum addressed a letter to Ms. Suzanne Lynch regarding Claimant's condition (EX 17, p. 7). At that time he had reviewed the MRI of the lumbar spine, as well as the MRI of the cervical spine. Noting no evidence of herniation or nerve root compression, the MRI showed diffuse cervical spondylosis with bulging of the discs at almost all levels from C3-4 to C6-7. Dr. Applebaum opined that Claimant did not have a surgical lesion in his neck or lumbar region and therefore, he did not need surgical intervention (EX 22, p. 16). The restrictions from June 27, 2001, remained the same (EX 17, p. 7).

On March 11, 2002, Dr. Applebaum stated that the discogram requested by Claimant was unnecessary (EX 17, p. 9). He explained that because of the acknowledged degenerative disc disease evident on the MRI, the discogram could be anticipated to be abnormal, and therefore, of little diagnostic value.[8] Dr. Applebaum added that he did not recommend continuing physical therapy. In his deposition, Dr. Applebaum answered that he did think Claimant was exaggerating his symptoms, but he did not necessarily think Claimant was malingering (EX 22, p. 28). However, he did note some of the inconsistencies and the possibility of symptom exaggeration. In disagreeing with Dr. Bartholomew's December 23, 2003, statement that Claimant was a candidate for surgery based on a positive discogram and complaints of pain, Dr. Applebaum stated that a positive discogram should have been anticipated due to the diffuse degenerative changes and was nonetheless not a basis for surgery

On August 29, 2002, Dr. Applebaum had reviewed the information regarding a recommendation for Claimant to attend sympathetic therapy. He opined that the therapy was not medically indicated and would be of no benefit to the Claimant (EX 17, p. 10). At his deposition, Dr. Applebaum opined that he did not feel that Claimant suffered from post-concussion syndrome (EX 22, p. 39). Dr. Applebaum also agreed that it would be unnecessary or careless to perform cervical surgery on Mr. Ambo (EX 22, p. 41).

[8] Dr. Applebaum explained during his deposition that he does not think discograms are reliable diagnostic tests. He explained that they are very subjective and dependant on the patient's response to the discogram (EX 22, p. 26).

Dr. Bradley Bartholomew

Dr. Bradley Bartholomew is a neurologist who treated Claimant beginning in April 2001, on the recommendation of Dr. Kewalramani (TR 69). Dr. Bartholomew's records are part of Claimant's Exhibit 10. He was not deposed. On April 3, 2001, Dr. Bartholomew examined Claimant's neck, noting no spasms but bilateral paravertebral tenderness and a good range of motion. Dr. Bartholomew also reviewed the MRIs taken of Claimant's cervical spine on May 18, 2000 and January 2, 2001. Dr. Bartholomew explained that there was a protruding annulus which was not causing compression but could have been causing pain. He recommended a facet block, and potentially a discogram if the facet block provided no relief (CX 10, p. 1).

On June 15, 2001, the facet blocks were administered, and Claimant felt complete relief for only one day. On July 11, 2001, Dr. Bartholomew noted that there was some paravertebral tenderness in the cervical musculature, and he discussed the possibility of cervical rhizotomy. Claimant did not wish to consider the surgery at that point. In November 2001, Claimant finally decided to have the surgery on his neck. Claimant stated that Dr. Bartholomew told him that the surgery may or may not help (TR 145). On November 12, 2001, Dr. Bartholomew recommended a discography at C5-6 and C6-7, explaining that Claimant deserved the benefit of the doubt, and that the surgery would be indicated if the discogram was positive (CX 10, p. 5).

On January 29, 2002, Dr. Bartholomew explained that the anatomical changes on the MRI and the physiological changes on the EMG and Nerve Conduction Studies, would suggest that a discography with real and sham injections could prove conclusive. Dr. Bartholomew suggested the helpfulness of another medical opinion (CX 10, p. 5).

On December 23, 2003, Dr. Bartholomew's notes stated that there were no neurological indications for surgery; however, based on Claimant's complaints of pain Dr. Bartholomew felt that Claimant was a candidate for surgery (CX 10, p. 15). The discogram showed moderate pain at C3-4 and none of the other levels appeared to be pain provocative. Dr. Bartholomew also indicated that there were no guarantees that the surgery would relieve Claimant's symptoms.

Dr. Victor Bazzone

Dr. Victor Bazzone is a neurosurgeon. He examined Claimant only once on June 11, 2003, and was the Independent Medical Examiner upon whom the parties agreed (TR 148). His deposition is Employer's Exhibit 21 and his records are part of Employer's Exhibit 2.

Dr. Bazzone found that the physical exam was normal but Claimant complained of pain in his lower back on the right side (EX 21, p. 22). Dr. Bazzone reviewed the medical records and some of the diagnostic tests; however, he recommended performing a new MRI and discogram. Dr. Bazzone reviewed the discogram and MRI results on October 7, 2003 (EX 21, p. 26). Based on his examination, as well as his review of the diagnostic tests, Dr. Bazzone noted that the C3-4 level was an area of concern, however, it was a subtle or minimal problem (EX 21, p. 26). Additionally, Dr. Bazzone suggested that Claimant see a neurologist because he had some concerns of post-concussive syndrome based on the history of Claimant's accident, namely complaints of forgetfulness and irritability which he felt were reported and substantiated (EX 21, p. 49). However, he explicitly stated that he did not recommend surgery on Claimant's neck, based primarily on the normal neurological exam of Claimant's neck. He assigned a permanent impairment rating on 5%, and assigned no restrictions, allowing Claimant to return to work as a diesel mechanic (EX 21, p.31).

Dr. Bazzone explained that if there is a normal neurological examination, and the only symptomology is pain, tenderness, or muscle spasms, then one would be on "very very thin ice" to recommend a surgical procedure because oftentimes the surgical procedure will not eliminate the pain (EX 21, p. 43). On October 7, 2003, Dr. Bazzone noted that Claimant suffered from no neurological deficits and the MRI findings at C3-4 were subtle, concluding that no surgical procedure was necessary for Claimant's surgical spine (EX 2, p.4)

Dr. Kevin Greve

Dr. Kevin Greve, a psychologist and professor at University of New Orleans, was recommended by Dr. Bartholomew, and evaluated Claimant on October 3, 2001. Dr. Greve's post-hearing deposition is Employer's Exhibit 20. Dr. Greve had a face-to-face interview with Claimant, performed psychological testing, and reviewed relevant medical records. After reviewing the evidence, Dr. Greve concluded that Claimant suffered from a significant degree of exaggeration of cognitive psychological complaints, and additionally, Claimant was not disabled

due to psychological reasons (EX 20 p. 19). Claimant stated that he put forth his best efforts on the test administered by Dr. Greve's office (TR 71).[9]

Dr. Greve explained that the recommendation for surgery had been based on Claimant's subjective complaints of pain, and he concluded that patient's complaints, while based on some degree of injury, were exaggerated, and therefore, from the psychological perspective one would have to be cautious about going forward. Psychological risk factors can predict the successful outcome of surgery (EX 20. p. 27). Dr. Greve stated that given the findings of Claimant's evaluation, there is a substantial risk for poor outcome following surgery. In other words, because of Claimant's exaggeration, Dr. Greve opined that the surgery might not result in the symptomatic relief that the Claimant is seeking (EX 20 p. 28). He also stated that the memory problems that arose a year after the accident would not be attributable to the head injury, and even if the memory problem had arisen sooner than a year from the accident, the symptoms were still inconsistent with a brain injury (EX 20. p. 35, 112). Dr. Greve felt questions were raised about why Claimant's intellectual performance on the testing was so low. Additionally, Dr. Greve felt that Claimant's complaints were not the kind of findings that one would see following a concussion (EX 20 p. 40), and he did not test for organic brain injury because it was not indicated.

Dr. Greve opined that Claimant's exaggeration was consistent with malingering but he was reticent to make a formal diagnosis because Claimant did not meet the primary criteria for malingering (EX 20, p. 61, 102). On cross-examination, Dr. Greve agreed that Claimant may be depressed and in pain, but reiterated that he exaggerated the degree to which the pain was present. Claimant's exaggeration level was beyond that which is seen in patients with psychiatric illnesses (EX 20, p. 93), and consequently, Claimant's reports of symptoms were unreliable (EX 20, p. 95).[10]

Dr. Greve stated that post concussion syndrome is not truly a syndrome in that it is simply a collection of symptoms which can appear in individuals who have never sustained a head injury; therefore, the source of the symptoms varies considerably (EX 20, p. 114). Dr. Greve also explained that neurologist would not be especially helpful in evaluating Claimant's symptoms, in spite of their *ability* to make such determinations.

[9] Dr. Greve agreed that his opinion is not a "medical" opinion (EX 20. p. 63).
[10] Claimant did not suffer from any disabling psychological conditions (EX 20)

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc*., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc*., 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on May 18, 2000 during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I

accept the parties stipulation. Claimant clearly injured his neck while disassembling a crane. The extent, duration, and disabling effects of that injury, however, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

There was no consensus amongst the medical professionals as to when or whether Claimant reached MMI. After reviewing the medical testimony, I am convinced that the surgery at issue is unnecessary, and therefore, there is no further medical treatment from which Claimant would substantially benefit. Namely, there is not a medical consensus which would recommend surgery.[11]

On October 7, 2003, Dr. Bazzone, a doctor on whom the parties agreed, reviewed the diagnostic tests that had been performed September 15, 2003. Those tests led to him state that Claimant did not need the cervical surgery, and he thereafter assigned a permanent impairment rating of 5%. Dr. Bartholomew suggested on December 23, 2003, that there were no neurological indications for

[11] In examining the various dates offered by other physicians I find that following: Dr. Schiavi only treated Claimant directly following the accident, and never reviewed the later diagnostic tests, therefore, his medical opinion regarding maximum medical improvement is less weighty. Dr. Applebaum's date for maximum medical improvement was prior to the definitive diagnostic tests, and therefore, I do not feel that his opinion was rendered with the totality of the information available to Drs. Bazzone and Bartholomew.

surgery, and any surgery would be based solely on Claimant complaints of pain. Additionally, Dr. Greve's testing revealed that the complaints, upon which Dr. Bartholomew relied, may have been exaggerated. Therefore, the basis for surgery is further diminished, and I find, based on the majority of medical experts' explanations, that the surgery would not result in a substantial or material change in Claimant's condition. Therefore, as nothing further could be accomplished to further Claimant's health, he was at maximum medical improvement on the date the final conclusive diagnostic tests were performed, September 15, 2003, when it was objectively determined that there was no operable lesion.

As to the argument that Claimant needs further evaluation for post concussion syndrome, I am persuaded by the observations of Dr. Schiavi and Applebaum, that Claimant did not suffer a concussion or head injury at his May 18, 2000, accident. Additionally, Dr. Greve's explanation of the common nature of Claimant's symptoms and the unlikelihood that a neurologist could make a definitive finding, are further persuasive. Therefore, in light of the three medical opinions, Dr. Bazzone's concerns regarding Claimant's reported symptoms of irritability and forgetfulness are not a basis for finding that Claimant is in need of further evaluation or treatment.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption.

The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident. Claimant has not attempted to return to work since the accident (TR 82). Some of the medical experts suggested that Claimant could return to his former employment, namely Dr. Bazzone, and

others issued restrictions which would suggest that he cannot return to his former employment, namely Dr. Bartholomew.

I find that, based on record as a whole which included thorough evaluation by several specialists as well as Claimant's recitation of painful symptoms, albeit exaggerated he is not able to return to the physical demands of his job as a diesel mechanic. Although Claimant's cervical condition is not in need of surgery, it was admitted by both Dr. Bazzone and Dr. Bartholomew that such a condition could be painful. Additionally, Dr. Applebuam recommended restrictions from prolonged bending and stooping or lifting anything over 40 lbs. In evaluating the events surrounding Claimant's injury, I find that the duties of a diesel mechanic would be too strenuous for somebody with Claimant's cervical condition. Although Dr. Bazzone felt that Claimant could return to work, I find that his opinion was rendered without a clear understanding of the heavy demands of Claimant's former employment. The restrictions identified by Dr. Applebaum on June 27, 2001, are an excellent indication that Claimant would no longer be able to perform the services required of a diesel mechanic for heavy machinery, namely scaling the boom of a crane to disassemble its rigging. Therefore, as of the date of the accident, May 18, 2000, Claimant proved a prima facie case of total disability.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). Suitable alternative employment was identified for Claimant on January 7, 2004. There was some discussion as to the availability of the jobs earlier than the date of the report, however, the evidence was not significant enough to make a determination as to specific wages and employers; therefore, I will only consider the jobs identified by Ms. Lillis on January 7, 2004.

In this instance, I find that Claimant had been released to sedentary or light duty work and Employer identified such work on January 7, 2004. Claimant's physical capabilities, as identified by Dr. Bazzone and Dr. Applebaum, indicate that Claimant is in fact physically capable of performing sedentary employment. The jobs identified by Ms. Lillis meet those criteria, and took into consideration Claimant's education, age and location. Therefore, I find that the call center representative, cashier at the Nature Center, or cashier at Piccadilly restaurant were all suitable jobs for Claimant. Likewise, as indicated by Claimant's employment history and current medical reports all of the jobs are suitable.

Claimant is obligated to take employment within his physical restriction and Employer is responsible for the difference between Claimant's new weekly wage and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp*., 23 BRBS 327, 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, 660 (1979).

Claimant's wage earning capacity for the suitable alternative employment is $7.00 per hour. Both the Nature Center position as well as the call center representative earned $7.00 per hour, and therefore, I find that wage accurately represents Claimant's earning potential. Claimant has not been restricted to a part-time job. Based on the medical evidence and his testimony at the formal hearing, Claimant is capable of working a 40 hour work week. In sum, I find that Claimant's wage earning capacity is based on a $7/hr wage for 40 hours per week, equaling $280/week.

Mindful, however, of the fairness concerns expressed in *Richardson, supra*, Claimant's wages are adjusted to reflect their value at the time of Claimant's May 2000 injury. The National Average Weekly Wage (NAWW) for May 2000 was $450.64, and the NAWW for January 2004 was $515.39. Thus, the 2000 NAWW was approximately 87 % of the 2004 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant had a *residual* wage earning capacity of $243.60 per week beginning January 7, 2004, the date of suitable alternative employment as identified by Ms. Lillis.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co*., 16 BRBS

255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv*., 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co*., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce,* 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'd 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co*., 682 F.2d 968 (D.C. Cir. 1982) (per curium) rev'g 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys*., 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.,* 16 BRBS 10 (1983).

Claimant has now agreed to surgery being performed on his cervical spine. However, I find, as discussed above in regards to maximum medical improvement, that the surgery requested would be unnecessary, based on the medical testimony of several doctors, including Dr. Bartholomew who ostensibly "recommended" the surgery. I find that although Claimant may have a *painful* neck, there are no reasonable neurological indications that surgery would relieve Claimant of the pain. According to Dr. Bazzone, basing cervical surgery solely on a patient's complaints of pain is unreasonable, especially when there is evidence from Dr. Greve that the complaints upon which the surgery is based are exaggerated, and that its success is doomed

As to the other medical procedures or treatments which were requested by Claimant, and denied by Employer, I find that, they were not necessary procedures, and therefore, not Employer's responsibility. The discogram requested by Dr. Bartholomew, however, was also found by Dr. Bazzone to be a helpful diagnostic tool. Therefore, in spite of Dr. Applebaum's explanation that such a diagnostic test was not helpful, I find that Dr. Bazzone and Dr. Bartholomew felt in was a reasonable request, and in light of Dr. Bazzone's ultimate findings, it was a necessary step in his conclusions. Therefore, I find that the discogram was an expense for which Employer was liable.

The sympathetic therapy recommended by Dr. Kewalramani was mentioned in passing, but without more evidence that the fact it had been recommended, I cannot make a determination as to its' reasonableness or necessity. Therefore, this medical expense is not assigned to Employer.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.,* 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp*., 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.,* 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or

neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. See *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997).

Employer and Claimant differ on the divisor to be used in calculating Claimant's average weekly wage. Claimant suggests that according to 10(c) the annual income should be divided by the number of weeks actually worked, 51. Employer, on the other hand, argues that according to 10(d), the annual earnings should be divided by 52, the number of weeks in the year.

There is some discrepancy as to the wages earned by Claimant in the year preceding his injury. I find that his wage records (CX 6), and not his social security earnings information (CX 7), are the most accurate means by which to calculate Claimant's earning between May 28, 1999 and May 19, 2000. Consequently, I find that Claimant's annual earnings during that period were $38,239.46 (CX 6) perseverance

Claimant's average weekly wage is most fairly calculated using the divisor of 52, not 51 as put forth by Claimant. This is because, although Claimant may not have worked that single week, there is no indication of whether he *chose* not to work or was not offered work or was injured. Claimant's wages should be divided by 52, which takes into account Claimant's annual wage. This is a similar method as that used to calculate wages for workers who worked substantially the whole year, like Claimant, but for whom wage records are available to determine the average daily wage. The only reason to divide by the annual earnings by the number of weeks worked is when the annual earnings are significantly lower because Claimant worked less than substantially the whole year. In this case, there

is no need to deviate from the 52 week divisor set forth in 10(d), and therefore, Claimant average weekly wage is $735.37.[12]

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer timely controverted the claim. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from May 18, 2000, until September 15, 2003, the date of maximum medical improvement, based on an average weekly wage of $735.37;

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from September 15, 2003, until January 7, 2004, the date of suitable alternative employment, based on an average weekly wage of $735.37;

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from January 7, 2004, to the present and continuing, based on the difference between the average weekly wage of $735.37 and the residual wage earning capacity of $243.60;

(4) Employer/Carrier shall pay or reimburse Claimant for all determined reasonable and necessary §7 medical expenses, resulting from Claimant's injuries of May 18, 2000, excluding, at this time, the requested cervical surgery;

(5) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(6) Employer/Carrier shall pay interest on all of the above sums determined

[12] $38,239.46 ÷ 52 = $735.37

to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

(7) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(8) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 7th day of May, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam